FILED
MAY 29 1992
OFFICE OF THE CLERK

No. 91-7328

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

LEONEL TORRES HERRERA,
Petitioner,

v.

JAMES A. COLLINS, Director, Texas Department of Criminal Justice, Institutional Division,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR PETITIONER

TALBOT D'ALEMBERTE
STEELE, HECTOR & DAVIS
First Florida Bank Building
Tallahassee, FL 33102
(904) 222-2300

MARK EVAN OLIVE *
2804 Glennis Ct.
Tallahassee, FL 32304
(904) 644-7710

ROBERT L. MCGLASSON
PHYLLIS L. CROCKER
TEXAS RESOURCE CENTER
1206 San Antonio
Austin, TX 78701
(512) 320-8300

Counsel for Petitioner

* Counsel of Record

BEST AVAILABLE COPY

QUESTIONS PRESENTED

I.

Whether the Eighth and Fourteenth Amendments permit a state to execute an individual who is innocent of the crime for which he or she was convicted and sentenced to death?

II.

What post-conviction procedures are necessary to protect against the execution of an innocent person?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
CITATION TO OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
I. THE CIRCUMSTANCES OF PETITIONER'S TRIAL	6
A. The Offense, The Arrest, Petitioner's Beating, and The Police Funerals Were High Drama	6
B. Police Crowded the Courthouse and Courtroom and Occupied both Witness and Juror Chairs	12
1. Prejudicial Police Presence	12
2. Police and Friends of Police on the Jury	14
II. THE EVIDENCE OF GUILT ALLOWED ROOM FOR MISTAKE	21
III. POST-TRIAL EVIDENCE OF INNOCENCE AND THE DISTRICT COURT'S STAY OF EXECUTION	25
SUMMARY OF ARGUMENT	31
ARGUMENT	32
I. THE EXECUTION OF AN INNOCENT PERSON VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS	32

TABLE OF CONTENTS—Continued

	Page
A. Society Recoils At the Execution of Innocent Persons	32
B. This Court's Jurisprudence Reflects Society's Collective Conscience And Requires Procedures Which Will As Much As Is Humanly Possible Prevent the Execution of An Innocent Person	34
II. BECAUSE THE STATE OF TEXAS DOES NOT PROVIDE A DEATH-SENTENCED INMATE A MEANINGFUL POST-TRIAL OPPORTUNITY TO DEMONSTRATE HIS OR HER INNOCENCE, FEDERAL HABEAS CORPUS RELIEF MUST BE AVAILABLE	38
CONCLUSION	45

TABLE OF AUTHORITIES

CASES:	Page
Ake v. Oklahoma, 470 U.S. 68 (1985)	39
Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936)	43
Banspach v. State, 91 S.W.2d 365 (Tex. Crim. App. 1936)	38
Beathard v. State, 767 S.W.2d 423 (Tex. Crim. App. 1989)	38
Berger v. United States, 295 U.S. 78 (1934)	35
Brady v. Maryland, 373 U.S. 83 (1963)	3, 28, 35
Cabana v. Bullock, 474 U.S. 376 (1986)	35
Caldwell v. Mississippi, 472 U.S. 320 (1985)	40
California v. Brown, 479 U.S. 538 (1987)	36
California v. Ramos, 463 U.S. 992 (1983)	39
City of Hammond v. Schappi Bus Line, Inc., 275 U.S. 164 (1927)	43
Coy v. Iowa, 487 U.S. 1012 (1988)	34
De Martino v. Weidenburner, 616 F.2d 708 (3d Cir. 1980)	44
Drew v. State, 743 S.W.2d 207 (Tex. Crim. App. 1987)	38
Dugard v. State, 688 S.W.2d 524 (Tex. Crim. App. 1985), *overruled on other grounds by Williams v. State*, 780 S.W.2d 802 (Tex. Crim. App. 1989)	38
E.I. duPont de Nemours & Co. v. Train, 430 U.S. 112 (1977)	43
Estes v. Texas, 381 U.S. 532 (1965)	12
Ex parte Binder, 660 S.W.2d 103 (Tex. Crim. App. 1983)	38
Ex parte Drewery, 677 S.W.2d 533 (Tex. Crim. App. 1984)	38
Ex parte Hawk, 321 U.S. 114 (1944)	39
Ex parte Herrera, —— S.W.2d —— (Tex. Crim. App. 1991)	24
Ex parte May, 717 S.W.2d 84 (Tex. Crim. App. 1986)	38
Fay v. Noia, 373 U.S. 391 (1963)	36
Ford v. Wainwright, 477 U.S. 399 (1986)	34, 39, 40, 41, 43, 44
Frank v. Mangum, 237 U.S. 309 (1915)	12
Furman v. Georgia, 408 U.S. 238 (1972)	32, 34

TABLE OF AUTHORITIES—Continued

	Page
Gardner v. Florida, 430 U.S. 349 (1977)	40
Granberry v. Greer, 481 U.S. 129 (1987)	42
Grannis v. Ordean, 234 U.S. 385 (1914)	44
Gregg v. Georgia, 428 U.S. 153 (1976)	32, 36, 37
Harris v. Reed, 489 U.S. 255 (1989)	39, 41, 42
Hawk v. Olson, 326 U.S. 271 (1945)	51
Holbrook v. Flynn, 475 U.S. 460 (1985)	14
In re Winship, 397 U.S. 538 (1970)	35
In re Murchison, 349 U.S. 133 (1955)	35
In re Kemmler, 136 U.S. 436 (1890)	32
Jackson v. Virginia, 443 U.S. 307 (1979)	34
Jennings v. Illinois, 342 U.S. 104 (1951)	38
Johnson v. Mississippi, 486 U.S. 578 (1988)	41
Keeney v. Tamayo-Reyes, 1992 U.S. Lexis 2690 (May 4, 1992)	43
Lewis v. Erickson, 946 F.2d 1361 (8th Cir. 1991)	40
Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947)	33
McCleskey v. Zant, 111 S. Ct. 1454 (1991)	36, 37
Mooney v. Hoolohan, 294 U.S. 103 (1935)	39
Murray v. Carrier, 477 U.S. 478 (1986)	37
Oregon v. Hass, 420 U.S. 714 (1975)	35
Penry v. Lynaugh, 492 U.S. 302 (1989)	28
People v. Dabbs, 23 N.E.2d 343 (Ill. 1939)	40
Pulley v. Harris, 465 U.S. 37 (1984)	33
Quigg v. Crist, 616 F.2d 1107 (9th Cir.), *cert. denied*, 449 U.S. 922 (1980)	44
Robinson v. California, 370 U.S. 660 (1962)	32
Rochin v. California, 342 U.S. 165 (1952)	33
Sanders v. Sullivan, 863 F.2d 218 (2d Cir. 1988)	40, 44
Schad v. Arizona, 111 S.Ct. 2491 (1991)	34
Schneckloth v. Bustamonte, 412 U.S. 218 (1973)	37
Sheppard v. Maxwell, 384 U.S. 333 (1966)	12
Snyder v. Massachusetts, 291 U.S. 97 (1934)	33
Spaziano v. Florida, 468 U.S. 447 (1984)	32, 33
Stone v. Powell, 428 U.S. 465 (1976)	32, 36
Strickland v. Washington, 466 U.S. 668 (1984)	35
Taylor v. Illinois, 484 U.S. 400 (1988)	34
Teague v. Lane, 489 U.S. 288 (1988)	36

TABLE OF AUTHORITIES—Continued

	Page
Townsend v. Sain, 372 U.S. 293 (1963)	39
Trop v. Dulles, 356 U.S. 86 (1958)	32
Tison v. Arizona, 481 U.S. 137 (1987)	35
United States v. C.I.O., 335 U.S. 106 (1948)	43
United States v. Havens, 446 U.S. 620 (1980)	35
United States v. Nixon, 418 U.S. 683 (1974)	35
United States v. Rosenberg, 195 F.2d 583 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952)	32
United States v. Wade, 388 U.S. 218 (1967)	23, 35
West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943)	41
Woods v. Dugger, 923 F.2d 1454 (11th Cir. 1991)	14
CONSTITUTIONAL AND STATUTORY PROVISIONS:	
28 U.S.C. § 1254(1)	1
U.S. Const. Amend. VIII	2
U.S. Const. Amend. XIV	2
OTHER:	
Randall Dale Adams, *Adams v. Texas* (1990)	5
Paul Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963)	39
Jeremy Bentham, *Works of Jeremy Bentham* (John Bowring ed., 1843)	34
Robert R. Bryan, *The Execution of the Innocent: The Tragedy of the Hauptmann-Lindbergh and Bigelow Cases*, 18 N.Y.U. Rev. L. & Soc. Change 831 (1991)	5
Foreword, Jerome Frank & Barbara Frank, *Not Guilty* (1957)	35
John Fortescue, *De Laudibus Legum Anglie* (1490)	33
Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970)	37, 40, 44
Huff, Rattner & Sagarin, *Guilty Until Proved Innocent: Wrongful Conviction and Public Policy*, 32 Crime & Delinquency 518 (1986)	5, 12, 23

TABLE OF AUTHORITIES—Continued

	Page
John Kaplan, *The Problem of Capital Punishment*, 1983 U. Ill. L. Rev. 55	33
Ludovic Kennedy, *Ten Killington Place* (1961)	34
Jim Mattox, "On Not Executing an Innocent Prisoner," *N.Y. Times*, Apr. 3, 1992	34
Edna Nixon, *Voltaire and the Calas Case* (1961)	34
Selected Letters of Charles Dickens (David Parosissien ed., 1985)	34
Penrod & Cutler, *Eyewitness Expert Testimony and Jury Decisionmaking*, 52 Law & Contemporary Prob. 43 (1989)	23
J. Pollak, *Dr. Sam: An American Tragedy* (1972)	12
Polson, *Essentials of Forensic Medicine* (1965)	23
Elizabeth A. Tuttle, *The Crusade Against Capital Punishment in Great Britain* (1961)	34

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-7328

LEONEL TORRES HERRERA,
Petitioner,

v.

JAMES A. COLLINS, Director, Texas Department of Criminal Justice, Institutional Division,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is unreported but is set forth in the joint appendix at 59-69. The opinion and orders of the United States District Court for the Southern District of Texas are also unreported and are set forth in the joint appendix at 28-58.

JURISDICTION

The judgment of the Court of Appeals was entered on February 18, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or [shall] cruel and unusual punishments [be] inflicted;

This case also involves the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property without due process of law . . . .

STATEMENT OF THE CASE

Leonel Herrera, the Petitioner, is innocent of the charge for which he was convicted and sentenced to death. The district court judge afforded Mr. Herrera an opportunity to prove his innocence but the Court of Appeals would not allow the hearing and held that innocence is not a basis to stop a state execution. This Court must decide whether the Constitution provides a federal district court judge with the power to prevent the execution of an innocent person.

The Court of Appeals did not fault Federal District Court Judge Ricardo Hinojosa for his substantial concern that Petitioner was innocent. Judge Hinojosa's conclusion was well-founded, given the pre-trial, trial, and post-trial information that he reviewed.[1] That record shows that a number of circumstances surrounding Petitioner's arrest and trial were highly unusual and conducive to the risk of fact-finding error that might result in the conviction and condemnation of an innocent man. Had no after-conviction evidence of innocence been brought

[1] Judge Hinojosa was already well-acquainted with the record in Petitioner's case because he presided over the proceedings respecting Petitioner's first federal habeas corpus petition.

to light, these circumstances, albeit troubling, would perhaps have remained no more than that: their degree of deviation from constitutionally prescribed procedural norms—as well as the extent of their impact on the outcome of the trial and sentencing—would have been subject to legitimate debate. But in a case in which substantial, plausible, after-presented evidence of innocence has been brought to light, these circumstances surrounding the original trial explain how such a trial could have produced a gross miscarriage of justice and demonstrate, consistent with Judge Hinojosa's judgment, just how important it is that the Constitution provides a remedy for the miscarriage when state law does not.

In part I of this section, Petitioner details how the circumstances and atmosphere of his pre-trial and trial proceedings presented the opportunity for a wrongful conviction and sentence of death. Part II describes the inconclusive evidence of guilt presented by the prosecution at trial. In part III Petitioner sets out the post-trial evidence that supports his claim of innocence. It discloses that police involvement in the drug trade in the Rio Grande Valley along the Mexican border led to the death of two police officers. Police knew but kept silent about Petitioner's innocence rather than reveal the unseemly and incriminating police-shared responsibility for these offenses.[2] Furthermore, the actual killer's son witnessed the killings, and has sworn that his father Raul Herrera, not Leonel Herrera, committed them. A former judge and now practicing attorney in the Valley has stated un-

[2] Judge Hinojosa not only provided Petitioner an opportunity to show his innocence but also ordered an evidentiary hearing on whether the State suppressed exculpatory evidence regarding police (and police victim) offense related illegal drug-trade activity and regarding police knowledge that Petitioner did not commit the offense. (J.A. 54). *Brady v. Maryland*, 373 U.S. 83 (1963). The Court of Appeals vacated Judge Hinojosa's order staying Petitioner's execution in which Judge Hinojosa had scheduled the *Brady* hearing for three days later. (J.A. 54, 62-68).

der oath that his former client, Raul Herrera (Leonel's brother), confessed to him that he, not the Petitioner, committed the crimes. This new information is in all detail consistent with the story contained in the trial transcript with respect to how the offense occurred, consistent but for one fact—it was Raul, not Petitioner, who was at the scene.

A comparison of the post-trial evidence with the pre-trial and trial record yields a counter-intuitive result. Rather than refuting Petitioner's claims the record as a whole serves to explain how it is that an innocent person could have been convicted. For example, the trial was held in an atmosphere which under the right circumstances could lead to a wrongful conviction: two police officers killed; highly public funerals; a massive publicized effort to capture the Petitioner; an arrest akin to a military operation; a police interrogation which ended with Leonel Herrera in a coma; an inflamed and prominent law enforcement presence throughout pre-trial and trial proceedings; an angry community; flags at half-mast; a jury selected from the fallen victims' colleagues and friends; clamoring press coverage; and shaky evidence which did not point only to the Petitioner. Rather than explaining why Leonel Herrera is guilty, these factors actually complement the claim of innocence.[3]

---

[3] Some of this pre-trial and trial atmosphere arose naturally upon the tragedy of these two deaths. Law enforcement activity after the offenses contributed especially prejudicial elements, however. These activities served to prevent the revelation of police complicity in an extensive drug trade that gave rise to the events responsible for the death of the two police officers. For example, immediately after the offense the police publicly designated Petitioner as the culprit, labeled Petitioner "public enemy number one," announced the largest manhunt in the history of the area to track him down, and upon his arrest beat him into a coma and left him handcuffed in the floor of his cell to die. All these events were prominently featured in the local press. Petitioner's post-trial evidence explains why the police might have wished to target and silence a scapegoat.

Other circumstances of the trial—including unreliable eyewitness testimony and an armed police officer serving on the jury—explain why Judge Hinojosa's judgment that Petitioner should be afforded a hearing was the right decision, if innocence matters. Judge Hinojosa, appointed in 1983, has presided as judge for almost a decade in the border area of South Texas where the crime occurred. Because of his knowledge of the local area and his familiarity with the record, when Judge Hinojosa considered the post-trial evidence he concluded that "out of a sense of fairness and due process" Petitioner should be afforded the opportunity to demonstrate his innocence. (J.A. at 38). Unsettling revelations—including state suppression of evidence and law enforcement's drug dealing in the Valley [4]—coupled with the extraordinary pre-trial and trial proceedings, convinced Judge Hinojosa that he should afford Petitioner an evidentiary hearing on his claim of innocence and suppression of evidence.[5] As shown in the following subsections, Judge Hinojosa's decision finds abundant support under the totality of the circumstances.

---

[4] One of the leading causes for wrongful convictions is police misconduct. Huff, Rattner & Sagarin, *Guilty Until Proven Innocent: Wrongful Conviction and Public Policy*, 32 Crime & Delinquency, 518, 528-29 (1986). There are a number of documented instances of the police "strengthening a case (either through the fabrication of false evidence or withholding exculpatory evidence) against a defendant they believe to be guilty." *Id.*; *see also* Bryan, R., *The Execution of the Innocent: The Tragedy of the Hauptmann-Lindbergh and Bigelow Cases*, 18 N.Y.U. Rev. L. & Soc. Change 831 (1991). This is especially true in cases involving the murder of a police officer. *See, e.g.*, Randall Dale Adams, *Adams v. Texas* (1990).

[5] Judge Hinojosa denied all of the claims in Petitioner's first habeas corpus action, and denied, as an abuse of the writ, claims two through five in the instant action. (J.A. 40-53) He concluded he needed more time and evidentiary development to assess the merits of claim one—the innocence and suppression of evidence claim—which is the only claim he has indicated has potential merit in Petitioner's case.

I. THE CIRCUMSTANCES OF PETITIONER'S TRIAL

A. The Offense, The Arrest, Petitioner's Beating, and The Police Funerals Were High Drama

Mr. Herrera is on death row in Texas for an offense that occurred on September 29, 1981. On that date at around 10:45 p.m. two law enforcement officers were shot within several minutes of each other at two different locations in a rural part of south Texas along the Mexico border known as "the Valley." (R. Vol. 13 at 42). Department of Public Safety Officer David Rucker was shot and killed on state highway 100 between Los Fresnos and Port Isabel, Texas. (R. Vol. 13 at 62). His body was found beside his patrol car on the highway. (R. Vol. 13 at 47). Later, Los Fresnos Police Officer Enrique Carrisalez was shot when he stopped a car for speeding just outside of Los Fresnos. (R. Vol. 12 at 42-50).[6] A purported eyewitness to this shooting, Enrique Hernandez, was sitting in Officer Carrisalez' car at the time of this shooting.[7]

Officers from all over the Valley were called to the scene of the crimes, including "City, State, and Federal agencies." (R. Vol. 13 at 63). Specifically, officers from "South Padre Island, Port Isabell [,] [t]he Cameron County Sheriff's Office . . . Federal Customs . . . Brownsville police officers . . . and DPS [Department of Public Safety] people" responded to the scene. *Id.* The Director of the Texas Department of Public Safety declared the person responsible for the deaths of officers Rucker and Carrisalez "public enemy number one." *See* "Massive

[6] Los Fresnos is a very small town with only four police officers. (R. Vol. 15 at 176). It is fifteen miles north of Brownsville, where the trial was later held.

[7] Hernandez, however, was not menaced by Carrisalez' attacker. Officer Carrisalez died nine days later following extensive surgery. (R. Vol. 14 at 136-37).

hunt on for killer," *Brownsville Herald*, Appendix 1 (hereinafter App.), [Docket Entry 1].[8] Indeed, the Director flew to the area of the crime immediately after the offense and pledged "the entire resources of the state" to the capture of the perpetrator. *Id.* Law enforcement officials came to believe that Petitioner, who had never been convicted of a violent crime, was the perpetrator, and "a massive manhunt," termed "the largest ever conducted here in recent times," *id.*, was launched to apprehend him. "Most Valley police departments . . . join[ed] the effort to apprehend the killer." *Id.*; *see also* "Suspect Captured," *Brownsville Herald*, App. 1 [Docket Entry 1] ("[T]he largest manhunt in the Valley in modern times.").

On October 2, 1981, trooper Rucker was buried in an official and elaborate police ceremony, with full military-like honors. Law enforcement dignitaries and officers from all over Texas, especially from the Valley, participated in the funeral services, with full law enforcement regalia.[9]

[8] The Appendix submitted with the petition for writ of habeas corpus is designated on the district court's docket sheet as part of docket entry 1.

[9] Troopers from all over the state came Friday to [Brownsville to] pay their last respects to one of their own—trooper David Irvine Rucker . . . . Funeral Services for the downed trooper were Friday afternoon at Harlingten's First Baptist Church.

Law enforcement officials, including about 100 Department of Public Safety Troopers, filled the small church to capacity . . . . The service was over in 30 minutes. About 100 law enforcement patrol cars, with emergency lights flashing, escorted the hearse to Brownsville's Buena Vida Cemetery for the 4:00 p.m. graveside ceremony.

There DPS director, Col. James B. Adams, presented Rucker's badge and name tag to the widow. Troopers Bud Peters and Sherwood Hamilton presented her with the Texas flag which moments earlier had wrapped the coffin.

[Continued]

On the afternoon of October 4, 1981, Petitioner was arrested near Edinburg, a small town located a short distance from Brownsville and Los Fresnos. He was arrested at the home of Gustavo and Sofia Salinas. (R. Vol. 14 at 34).[10] Responding to an anonymous call, twenty or more law enforcement officers from all over the Valley, including city, state, and federal jurisdictions, had met at the Edinberg police department, planned Petitioner's arrest, and then converged on the Salinas home. (R. Vol. 15 at 6-9).[11] Evidence was seized from Petitioner and from the residence, including a wallet (R. Vol. 15, p. 25), a set of car keys, and a letter. (R. Vol. 15 at 45). The car keys operated an automobile linked to the offense which the police had impounded several days earlier and which was regularly driven by Petitioner. (R. Vol. 15 at 41).[12]

Upon his arrest, Petitioner was taken by a small army of officers to the Edinburg police department. *Brownsville Ledger*, App. 1 [Docket Entry 1] ("The stoic Herrera was hustled into the jail by a large number of DPS

---

[9] [Continued]

> About a hundred state troopers along with numerous other city and county police officers lined the cemetery. They stood at attention as the Rucker family left.

"Many Mourn Trooper's Death," *Brownsville Ledger*, App. 1 [Docket Entry 1].

[10] Judge Hinojosa presides in McAllen, Texas, approximately ten miles from where Petitioner was arrested.

[11] *See also Brownsville Ledger*, App. 1 [Docket Entry 1] ("Herrera was captured five days [after the offense] at a friend's home in Edinburg after a massive manhunt by DPS agents, Texas Ranger Bruce Casteel and various Valley police departments."); *Brownsville Ledger*, App. 1 [Docket Entry 1] ("The gang-capture of Herrera by an estimated 25 law enforcement officers . . . ended what had been described as the largest man hunt in the Valley in modern times.")

[12] As will be shown, Petitioner's brother took this automobile on the night of the offense. *See* App. 10 [Docket Entry 1].

troopers who took charge of the fugitive shortly after he was apprehended."). Several hours later, Petitioner left the police department in a hearse—bleeding, unconscious, and paralyzed, on his way to a hospital emergency room. What happened between the time Petitioner arrived at the jail and the time he departed to leave him in such a horrific state was a matter of some controversy, but the police offered the following explanation.

At the police station Mr. Bruce Casteel, a ranger with the Texas Department of Public Safety, began interrogating Mr. Herrera. "After about 20 or 30 minutes of conversation . . . . [Mr. Herrera said that] he needed to see his attorney, or an attorney," (R. Vol. 15 at 73), according to Casteel's testimony. That same evening, and some time after Petitioner refused to speak without the assistance of counsel, an Hidalgo County Assistant District Attorney, Joe K. Hendley, confronted Petitioner at the jail and screamed, "Why did you kill David [Rucker]." (R. Vol. 18 at 50-52). Hendley testified that he was speaking loud and stern, directly in Petitioner's face. (R. Vol. 18 at 47-59) ("[N]ot nose to nose, but almost."). Petitioner struck him. (R. Vol. 18 at 53.).[13] Several officers then entered the interrogation room and "restrained" Petitioner. (R. Vol. 18 at 66).[14]

---

[13] Hendley was a prosecutor in neighboring Hidalgo County. The crime and the trial occurred in Cameron County. The trial judge noted:

> I think it passingly queer that some assistant district attorney in Hidalgo County got involved in this, but that's not part of this trial.

(R. Vol. 15 at 77).

Petitioner's proof now places the Hidalgo County interest in context. Part of Petitioner's post-trial proof is that law enforcement authorities in Hidalgo County, including the Sheriff, knew that Petitioner had not killed anyone and that Rucker's (and their own) involvement in the drug trade was inextricably linked to the deaths.

[14] Petitioner's version was that Hendley tortured him by holding a lit cigarette lighter under Petitioner's nose. (R. Vol. 18 at 53).

When defense counsel arrived at the jail he found Petitioner unconscious, badly beaten with fifteen to twenty marks on his body, paralyzed and handcuffed, lying on the floor of his cell. (R. Vol. 18 at 44). As evidenced by counsel's proffer to the Court, counsel quite literally had to beg the police chief to let Petitioner be taken to the hospital. Petitioner would otherwise have died in his cell. *Id.* The police provided a hearse to take Petitioner to the hospital. (R. Vol. 18 at 67).[15] Petitioner's sister arranged for a doctor to come to the hospital to treat Petitioner. (R. Vol. 18 at 91-93). According to this physician, Petitioner "was in a state of unconsciousness, unresponsive to verbal stimuli or painful stimuli;" his right eye was turned to the inside; he was "swollen in the face;" had "shallow respiration;" he "didn't have any reflexes . . . from the neck down;" and he had "a large lump on the left side [of his head] above the left ear." *Id.* "[I]f he was faking or was conscious," the doctor explained, "I cannot see how he could have stayed in there while the anesthesiologist was passing the tube down his trachea." (R. Vol. 18 at 96).[16]

---

[15] Scores of police accompanied the hearse to the hospital and stood guard while the doctor examined Petitioner. (R. Vol. 13 at 93) ("[T]here were a lot of policemen, a lot of excitement going on around there.") (doctor's testimony).

[16] An emergency room physician provided similar testimony. Dr. Francisio Pena testified that Petitioner was "semi-conscious, and he was having some difficulty breathing." *Id.* at 78. He continued:

> I noticed that he did not have movement or have limited movement to the arm and in the lower extremities. He also had what we call an internal strabismus, which is an inturning—an involuntary movement of the eye when the eyeball turns inward. Also, his pupils were kind of sluggish to light reflex, and he had almost completely absent reflexes in the lower extremities.

Id. at 81. He next noted "bruises . . . around the neck" and "an area—I believe it was on the left side of his head—that looked like a bump on gross examination" *Id.* He said:

> Our main interest at that point was to go ahead and establish an airway and go ahead and start intravenous fluids, which Dr. Hadela was around the area, who was an anesthesiologist, and he was called by me to come over and help us with him. He incubated the patient . . ., inserted an endotracheal tube, which is a tube that goes through the nose, down the throat into the trachea, to maintain an open airway for adequate breathing and after that we started some intravenous fluids.

Id. Petitioner had "sluggish reflexes of the pupils," *id.*, and "it would be virtually impossible to fake those." *Id.*

This entire episode was chronicled in the press.[17] Also widely reported was the subsequent death of Officer Carrisalez. He was buried in the small town of Los Fresnos.[18] His funeral was observed town-wide—flags all over town flew at half-mast; stores throughout town closed for the services; law enforcement officials from around the state lined the walkways at the service; and a caravan of local police cars traveled to the Brownsville cemetery.[19]

---

[17] *See, e.g.*, "Herrera Denied Bond," *Brownsville Ledger*, App. 1 [Docket Entry 1] ("Still clouding the capture, however, is an allegation by Herrera's wife that he was pistol whipped and beaten while being questioned by Hidalgo County Assistant District Attorney Joe K. Hendley shortly after his capture."); "[S]uspect captured," *Brownsville Ledger*, App. 1 [Docket Entry 1] (Following an "altercation with Hendley after some four hours of questioning . . . the accused killer was taken to the city hospital by a large number of police officers who also stood guard through the night.").

[18] Los Fresnos is the home town of a police officer who served on Petitioner's jury. *See* part I, B, 2, page 14, *infra*.

[19] Hundreds of residents of this sleepy town were at the churchyard an hour before the scheduled 10 a.m. services for police officer Enrique Carrisalez . . . . Los Fresnos Saturday was mourning its first loss of a police officer on duty in its history. Flags hung at half mast at most businesses along the short stretch of Texas 100 that lie within the city limits.

A few stores had closed for the duration of the church services.

Uniformed officers from as far away as Corpus Christi and Houston lined the church walkway. A small contingent of DPS troopers took their position alongside them . . . . Valley Police officers clustered with their own near their respective police vehicles and whispered to themselves.

[Continued]

These circumstances illustrate the high degree to which the Valley was inundated with information about the offense, and was enfused with sympathy for, and committed to solidarity with, the police and their fallen officers. Petitioner's post-trial evidence that the jury made a mistake is wholly compatible with this volatile atmosphere which permeated the courtroom as well as the Valley.[20]

B. Police Crowded the Courthouse and Courtroom and Occupied both Witness and Juror Chairs

As the prosecutor told the local jurors at the beginning of voir dire, "[y]ou have to be a hermit to not have heard about this case." (R. Vol. 4 at 80). And even a hermit would have quickly learned that the law enforcement community was up in arms.

1. *Prejudicial Police Presence*

Police crowded the courthouse and were visible to the jurors throughout the proceedings. One affiant who was present at trial described the atmosphere:

> I was present at every day of the trial. Each day of the trial, the Brownsville Courthouse parking lot was overflowing with marked police cars. There were

[10] [Continued]

All would later join a caravan to the Villa Nueva Cemetery on west U.S. 281, about five miles west of Brownsville where the young officer was buried.

"Slain Police Officer Buried," *Brownsville Ledger*, App. 1 [Docket Entry 1].

[20] A trial ingredient which can contribute to erroneous convictions is community passion and a trial in a mob-like atmosphere. *See* Huff, Rattner & Sagarin, *supra* note 4 at 530. One of the best examples of this type of erroneous conviction is Dr. Sam Sheppard's case. His trial, like Petitioner's, was conducted in a highly charged atmosphere. *See* J. Pollack, *Dr. Sam: An American Tragedy* (1972); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *see also Estes v. Texas*, 381 U.S. 532 (1965); *Frank v. Mangum*, 237 U.S. 309, 349 (1915) ("Any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere").

> cars from the Edinburg Police Department, the Brownsville Police Department, the Department of Public Safety, Border Patrol, Los Fresnos, the Cameron and Hidalgo Sheriff's Departments, and others. . . . Every day the parking lot would get too full of cars and you would see police cars lined up along the side streets as well.
>
> Inside the courthouse, police officers wearing their uniforms were everywhere. There was nowhere you could look inside the courthouse without seeing police and sheriff uniforms . . . .
>
> Inside the courtroom where the trial took place, there were police officers in uniforms and with their guns showing, lined up at the back of the courtroom. There were also many other officers sitting in the audience.
>
> The families of the victims were present and often had officers around them. The chief of the Los Fresnos Police Department always stayed very close to Mrs. Carrisalez.
>
> In front of the audience, where the judge and the jury and Leo and the attorney were, there were at all times at least five uniformed police officers standing at attention. They carried guns. I believe they were from Brownsville. Two of these officers would stand to one side of the judge guarding a door, and the other three would stand always to one side of the jury.
>
> On the day of the sentencing, the largest number of police officers were at the trial. There was not enough seats for everyone that wanted to sit down the courtroom space was so packed. Everyone there seemed to have guns. Tension was very, very high. I remember thinking that with all of these guns and everyone on edge like they were, that if Leo didn't get the death penalty that somebody would probably shoot him right then and there.

App. 2 [Docket Entry 1].[21]

[21] The presence of a substantial number of armed officers and other questionable security practices in the courtroom may taint the

Twenty-four police officers testified at the guilt phase of the trial. Six testified at the sentencing phase.[22]

2. *Police and Friends of Police on the Jury*

Detective Joseph J. Bressler, Brownsville Police Department, (R. Vol. 9 at 102-16), served as a juror in Petitioner's case, as did friends and relatives of police officers, over the objection of Petitioner and defense counsel. The trial was in Brownsville. The slain officers had been buried in Brownsville, with the police in attendance. The Brownsville Police Department had participated with everyone in the Valley (and state-wide) in investigating the offenses. Detective Bressler lived in Los Fresnos (R. Vol. 9 p. 102), where the offenses occurred and where one of the victims was an officer. Los Fresnos was fifteen miles from the courthouse, and from Detective Bressler's police department office.

Three months and one week after the offense and burials, this local police officer sat on Petitioner's jury.[23] He pre-

---

fact-finding process. In *Holbrook v. Flynn*, 475 U.S. 460 (1985), this Court acknowledged that "a roomful of uniformed and armed officers" can preclude a defendant's chances of receiving fair trial. *Id.* at 570; *see also Woods v. Dugger*, 923 F.2d 1454, 1460 (11th Cir. 1991) (holding that presence of substantial number of uniformed officers communicated following message to jury: "[T]he officers wanted a conviction followed by the imposition of the death penalty.").

[22] Police threatened the Herrera family during the trial that if they exposed the police harm would come to them. *See* Petition for Rehearing, Court of Appeals.

[23] Unknown at the time of trial was that this juror carried a gun during his juror service, a gun that was visible to other jurors. Furthermore, this juror told another juror that he knew one of the victims, contrary to what he said during voir dire. (R. Vol. 9 at 107-08). According to juror Siracusa, who served at Petitioner's trial and sentencing (R. Vol. 7 at 185), juror Bressler had a gun, told her he was a police officer, and told her he knew one of the victims. Juror Siracusa, while acknowledging the truth of these allegations, would not sign an affidavit. *See* App. 3 [Docket Entry 1].

sumably listened to and weighed the testimony of scores of witnesses who—like him—wore a police uniform. His peers, comrades, and fellow officers evinced certainty that Petitioner was responsible for the death of two police officers, and they were intent upon avenging the victims' deaths.

Petitioner made it perfectly clear that he believed that this detective should not participate in a judicial decision regarding his guilt or punishment. Tral counsel for Petitioner advised that court that

> Because of the expressions of my client, the defendant, I respectfully request the Court to grant me an additional peremptory challenge. I can understand his feeling that being accused of two formal indictments of capital murder the impossibility of having a policeman, even one as apparently sincere as Mr. Bressler is, that it's important to him.

Id. at 119. The trial judge responded that the Petitioner had exhausted his peremptory challenges and that the court was going to provide him with any more.

Detective Bressler was only one of four jurors to whom Petitioner objected, ultimately resulting in Petitioner being silenced by the Court. The trouble first began with potential juror Mike Guajardo. This juror had a cousin in Los Fresnos who was a policeman at the police department. (R. Vol. 9 at 88).[24] The next juror was Detective Bressler. The detective was followed by Ashton L. Barefoot, whose son-in-law was a police officer at the Brownsville police department. (R. Vol. 9 at 129-35). This son-in-law had had problems being assaulted by prisoners. *Id.* at 131-32.

---

[24] As already explained, the victim in Petitioner's case was one of the four police officers who worked at the police department in Los Fresnos. This juror's cousin worked with, knew, and ostensibly grieved over the death of the victim, and investigated, in an official capacity, the crime involved.

Finally, petitioner found Daisy Mae Hanks to be objectionable. Ms. Hanks worked as a cook at the Beachcomber on Padre Island. *Id.* at 139. Trooper Rucker was stationed on the island, he was "a friend" of hers, *id.* at 141, and he used to drink coffee with her at the Beachcomber. She "liked him very much." *Id.* at 148. She stated that everybody talked about his death when it happened, and that "we were all dumbfounded. Everybody was." *Id.*

As noted above, defense counsel first voiced Petitioner's strong objection to the Brownsville detective. Petitioner himself also objected to the jury composition. Defense counsel gave the judge a letter from Petitioner which stated in extremely courteous and deferential language that he needed another attorney because "the handling of my jury selection has been very unfair due to [counsel's] actions and the state's as well" and because "I will use him [defense counsel Bates] as a witness to my beating during my capture." (R. Vol. 10 at 62-63). Juror questioning was interrupted as the trial court judge abruptly and without inquiry rejected Petitioner's complaints out-of-hand.[25] The Court did not address in any fashion Petitioner's concern about the jurors expressed in the letter.

After a recess, a potential juror returned to the courtroom. Petitioner then made two brief statements expressing exasperation at the apparent unfairness of the proceedings, whereupon the Court removed him from the courtroom, wrongly stating that the Petitioner had asked

[25] MR. BATES: Your Honor, he has written me a letter asking that I be fired.

THE COURT: The letter states that—it will be made a part of the record—he requests "the withdrawal of my attorney, Mr. Jim Bates." Of course, the requests will have to be denied because it would simply delay the trial.

Mr. Herrera, at this time I cannot grant it because it would serve as a delay in the trial.

(R. Vol. 10 at 60).

to be removed, and still making no mention of Petitioner's concerns.[26] The judge did not ask Petitioner any questions, he told Petitioner that Petitioner could not speak, and he banished Petitioner from the courtroom.

The Court then recited what Leonel Herrera's objections were:

> (Defendant removed)
>
> All right, the record should reflect that the defendant has been, at his own request, taken from the courtroom [27]. . . .
>
> Just before the recess there was a letter handed up by the defendant . . . . The letter reads, "Mr. Hester, Your Honor, I would greatly appreciate you consider my request for the withdrawal of my attorney, Mr. Jim Bates."
>
> "With all due respect to Mr. Bates, I have decided that the handling of my jury selection has been very unfair due to his actions and the State's as well."

[26] (Prospective juror returned)

MR. CANTU: I apologize for the state.

THE DEFENDANT: I do not consider this a trial. I consider this a lynching party. That's the way I feel.

THE COURT: Mr. Herrera, you can either sit there and listen to the trial [i.e., do not speak] or we'll put you in a cell and you can watch your trial on television, but you will not disrupt this trial.

THE DEFENDANT: I already have.

THE COURT: For the present, we're going to have you moved back into the observation room and you can stay back there and you'll see and hear the entire proceedings.

(R. Vol. 10 at 61).

[27] The record shows no request by Petitioner to be removed from the courtroom. It was entirely an action taken by the judge on the judge's own motion.

Id. at 63-64. The Court did not inquire why Petitioner belived the jury selection was unfair. The Court finished reading the letter into the record, and took a recess.[28]

After the recess, the Court made it even plainer that the Petitioner would not be heard to object about anything. The judge had allowed Petitioner to return to the courtroom, but told him not to address the Court.[29] Selection of the alternate jurors continued, was completed, and a recess was taken until the next day.

When Court resumed, the jurors had not been sworn and counsel made a motion for mistrial based upon what he contended were objections had by the Petitioner:

> MR. BATES: If your Honor please, now comes the defendant, Lecnel Torres Herrera, who is present in

[28] Before recessing, the prosecutor asked the Court to instruct the jury that Petitioner had requested that he be removed from the courtroom, which was false:

> Prior to the impaneling of the jury so that the jury might not feel that the Court has participated in doing a wrong to the defendant in the trial and that they may not consider that in their final determinations on this case, may I ask that the Court instruct the—that it was the defendant that has opted to place himself in the glass booth?

(R. Vol. 10 at 63-64.) The defendant in fact only opted to say something to the Court, whereupon the Court isolated the Petitioner. Petitioner did nothing that he could reasonably have expected would result in his being banished or in the judge refusing to allow him to speak in open Court.

[29] [THE COURT]: If you disrupt the proceedings, you will be taken to the glass enclosed booth and kept there where you can see and hear the proceedings but cannot disrupt them. It is much to your advantage to be at the table with your lawyers where you can consult and they can consult with you, but I will not allow my courtroom to be disrupted and *if you attempt to stand or speak you will be removed immediately to the booth and kept there.* Do you understand?

THE DEFENDANT: I understand.

(R. Vol. 10 at 66-67) (emphasis added).

> the courtroom, by and through me, James S. Bates, on his own behalf and moves the Court to grant a mistrial in this case . . . [because] the defendant personally feels that the selection of jurors number 9, 10, 11 and 12 were wholly unfair and unjust, as far as he is concerned. He feels that jurors number 9, Mr. Guajardo, who has a first cousin on the Los Fresnos Police Department, who was working with the deceased, Carrislaz, and is still a policeman there, was an unfair selection. Second, the juror Joe Bressler, who is an active duty criminal investigator for the Brownsville Police Department, was selected for the reason that the court did not advance a peremptory challenge to the defendant. Third, the juror Barefoot has a son-in-law who is a full-time policeman for the City of Brownsville. Fourth, Mrs. Hanks, Port Isabel, was at least a weekly coffee drinker with the deceased, Rucker, in a companion case which the State has advised the defendant and myself will be used by the State as an extraneous offense in this case.

(R. Vol. 15 at 5-6). The motion was denied.

Without regard to whether the inclusion of one or all of these jurors on Petitioner's jury was constitutional error, plainly their jury service is harmonious with Petitioner's post-trial evidence of his innocence. Just with respect to Detective Bressler, voir dire starkly illustrates that jurors affiliated with law enforcement could be more prone than other jurors erroneously to find guilt, especially in a case involving a crime against police officers.

Detective Bressler's voir dire began with his introduction by the prosecutor as "an officer with the Brownsville Police Department." (R. Vol. 9 at 102). The detective then was asked by the local prosecutor whether he could be fair:

> Q. Do you think that because you are a peace officer and the victim in this case was a peace officer

that you could be impartial in this case or do you think it would affect your serving on this jury?

A. I don't know, sir. I really—I don't know.

Q. Have you formed any opinion with regard to the defendant's guilt?

A. No, sir.

Q. When you said you don't know, can you tell me more about how you feel about that?

A. Well, sir, I just don't know. I'm not that up. I don't know.

(R. Vol. 9 at 102). Detective Bressler had himself investigated homicides, had been in scuffles in the line of duty, and had experience with investigative techniques such as dusting for fingerprints. He had been in law enforcement in the Coast Guard for ten years before becoming a civilian police officer, and he had been a fireman before that. The detective agreed that "all of [the detective's] adult life [except one year] you've been in some form of uniformed service to the public." *Id.* at 106-18.

As a result, the detective admitted that "to turn [petitioner] loose" would "be a pretty hard decision for a policeman to make," *id.* at 117, but stated that if that was what the system required, that was what he would do. But this detective also insisted that police ultimately always learn the truth about an offense and, ostensibly, tell it. This is accomplished through "[i]nvestigation, just keep going into it until the truth comes out. Eventually, it does." *Id.* at 111.

Q. Does it [the truth] always come out?

A. I think it does. I think it does. If you pursue something hard enough, it will come out.

Id. at 111. This juror then considered the testimony of scores of police officers who presumably had pursued their

investigation into the crime "hard enough" to make "the truth come[] out." [30]

II. THE EVIDENCE OF GUILT ALLOWED ROOM FOR MISTAKE

Petitioner received the death penalty for the Carrisalez case. However, the state was permitted to introduce substantial evidence about the Rucker crime during the guilt phase of the Carrisalez trial,[31] and the death penalty argument was largely predicated upon the death of two officers. For example, the medical examiner who examined both bodies testified about his findings (R. Vol. 14 at 136) ("Q. [Prosecutor] We're here to talk about David Rucker and Enrique Carrisalez. Let me start with Enrique Carrisalez."), police officers testified about both crime scenes (R. Vol. 13 at 62, 135; R. Vol. 14 at 3, 4, 90, 95, 99, 102, 122; R. Vol. 15 at 28, 39, 48), a videotape of the Rucker crime scene was introduced (R. Vol. 14 at 158; Exhibit 61), testimony about Rucker's family and his performance as a trooper was introduced (R. Vol. 15 at 30-32), and testimony that Rucker was a courteous officer was introduced. (R. Vol. 13 at 109). The entire prosecution case at both stages of trial was evidence of the two homicides.

This evidence was presented mostly through the testimony of police officers—twenty-four testified at trial, about the crime scenes, the arrest, the hospitalization, and forensic evidence.[32] Specifically the state's evidence at trial included the testimony of one eyewitness, the dying declaration of one of the victims, physical evidence from the crime scene, and evidence taken from Petitioner upon his arrest. This evidence will be taken up seriatim.

---

[30] Petitioner's post-trial evidence is that the whole truth was not told at trial.

[31] The state advised the Court pre-trial that evidence of both crimes would be introduced. (R. Vol. 2 at 27).

[32] Six officers tesitfied at sentencing and discussed, among other things, Mr. Herrera's supposed bad reputation.

The "eyewitness," Enrique Hernandez, was a passenger in the Carrisalez vehicle. Mr. Hernandez was a friend of Carrisalez', and went out with him in the patrol car the night of the incident. (R. Vol. 12 at 18). He testified that they stopped a speeding vehicle and Carrisalez exited his car and approached the stopped car. (R. Vol. 12 at 40). According to the witness, a person got out of the stopped car and shot Carrisalez. (R. Vol. 12 at 50). The witness then ducked out of sight, having seen the gunman for a "a matter of seconds." (R. Vol. 12 at 51). He described the assailant as having a mustache, and identified Mr. Herrera in court as the culprit. (R. Vol. 12 at 52-53).

The Federal District Court in its opinion with respect to Petitioner's first habeas corpus proceeding was concerned about the suggestiveness of the Hernandez identification procedures. Just hours after the shooting, Hernandez was shown six photographs. Leonel Herrera's picture was in the array. Hernandez could identify none of the persons depicted in the photographs, but he did select three of the photographs and testified "you could say that it could have been any one of these, but I just wasn't sure". (R. Vol. 12 at 114). Petitioner's picture was one of the three. He did not have a mustache in the picture. (R. Vol. 13 at 7-9). Two days after the shooting, a single photograph of Petitioner was shown by itself to Hernandez, who identified Petitioner as the culprit. (R. Vol. 15 at 133-134). This picture was a mug shot of Petitioner with "Edinburg Police Department" noted on the photo, "suggest[ing] [petitioner] was already in custody." (Memorandum Opinion, Oct. 4, 1989, at 6). The witness later picked Petitioner from a lineup.[33] The District Court held that "[u]nder normal circumstances, this Court would not hesitate to find this procedure impermissibly suggestive", *id.* at 8, but sustained the procedure nonetheless because of the exigencies of the circumstances under which the police were operating.[34]

[33] Petitioner was the only person in the line-up who did not have a mustache. (R. Vol. 13 at 8-9).

The dying declaration evidence of the victim Carrisalez was similarly unreliable—only the mug shot was shown to him in his hospital room and according to the state's proof the victim then nodded. The victim spoke no words, he was on a respirator, and he had undergone extensive surgery and had earlier been narcotized with morphine and valium. (R. Vol. 15 at 156-157, 180). This was an extremely suggestive and unreliable identification procedure, and the District Court found it to be so, but sustained it. (Memorandum Opinion, Oct. 4, 1989, at 13).

The physical evidence introduced included a wallet taken from Mr. Herrera upon his arrest. It had type A blood on it (R. Vol. 15 at 85), which was Rucker's blood type and is the blood type of 42% of the population. Polson, *Essentials of Forensic Medicine* 230 (1965). Some pants taken from the residence where Petitioner was arrested had two small spots of type A blood on them. (R. Vol. 15 at 49). The keys taken from Petitioner started the automobile purportedly involved in the offense. (R. Vol. 15 at 19). A letter taken from Petitioner was intro-

[34] The single most important factor leading to wrongful convictions in the United States is mistaken eyewitness identification *See* Huff, Rattner & Sagarin, *supra* note 4 at 523; *see also United States v. Wade*, 388 U.S. 218, 229 (1967) ("[T]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined"); Penrod & Cutler, *Eyewitness Expert Testimony and Jury Decisionmaking*, 52 Law & Contemporary Prob. 43 (1989).

duced in which he discussed, but did not confess to,[35] the homicides. (R. Vol. at 82-84).[36] A social security card with Petitioner's name on it was found several feet from Rucker's body.[37]

This evidence,[38] when considered in conjunction with Petitioner's post-trial evidence, is consistent with Petitioner's being innocent of the offense.[39]

[35] In the District Court's first opinion, the Court wrote simply that in the letter Petitioner "*essentially* admitted killing Carrisalez", (Memorandum Opinion, October 4, 1989) (emphasis added), implicitly acknowledging that the letter did not contain a confession, only something which could be so interpreted.

[36] In this letter, Petitioner referred to the fact that Rucker had been doing business on the wrong side of the law and that that was why the offense occurred. He stated that Carrisalez had been killed, but he did not say who had killed him.

This disjointed and rambling letter and Petitioner's later threatening hospital bed comments, *see* note 38, *infra*, are best understood in light of Petitioner's then unstable mental state. Petitioner's post-trial evidence is that he suffers from debilitating drug dependence, documented major mental illness, and diagnosed neurological dysfunction, *see Ex Parte Herrera*, No. TC-91-21-179 (January 14, 1991 Texas Court of Criminal Appeals) (Clinton, J., dissenting) (J.A. 16-19); *id.* at 24-27 (Maloney, J., dissenting), and so suffered at the time of his arrest. The contents of the letter and Petitioner's hospital threats are compatible with innocence when one realizes that the speaker was mentally unbalanced and was, on the one hand being tracked down, and on the other had earlier been beaten into a coma, by the police, when he purportedly made the statements.

[37] Petitioner's brother, Raul, had a set of keys to and often drove the same car Petitioner drove. Petitioner always left his social security card in this car. App. 10. [Docket Entry 1].

[38] At sentencing the state presented evidence that when Petitioner awoke in his hospital bed after his "interrogation," he threatened the police. As discussed above, upon his arrest, Petitioner invoked his right to silence. A Hidalgo County prosecutor burst in afterwards and asked in a raised voice why Petitioner had killed Rucker. According to police testimony, Petitioner knocked the prosecutor unconscious, whereupon Petitioner was "subdued" by the police. Finding him subdued, unconscious, paralyzed, bleeding, and handcuffed on the floor of his cell, Petitioner's lawyer demanded that the police take Petitioner to a hospital. When Petitioner awoke in his hospital bed and saw the people who had "subdued" him—the police—he purportedly threatened to kill the police who were there. (R. Vol. 18 at 29, 32, 34).

In Mr. Herrera's first habeas corpus action, the district court found that the prosecutor violated Petitioner's rights by interrogating him, but that the threats made by Petitioner at the hospital were far enough removed from the violation to not have been caused by it. (Memorandum Opinion at 19-22).

[39] After Petitioner's trial, and while he was awaiting trial in the Rucker case, he was again severely beaten by law enforcement officials, and hospitalized. App. 19 [Docket Entry 1]. After this beating Petitioner entered a guilty plea in the Rucker case, and in return for the plea arrangement he stated that he was guilty of the Carrisalez murder.

[40] Indeed, if the letter of "confession" introduced by the State at trial shows anything it is that Rucker was involved in the drug business. Again, the trial record complements, rather than refutes, Petitioner's claim of innocence.

III. POST-TRIAL EVIDENCE OF INNOCENCE AND STATE SUPPRESSION OF EVIDENCE, AND THE DISTRICT COURT'S STAY OF EXECUTION

According to Petitioner's allegations, the Sheriff of Hidalgo County was involved in drug trafficking. Officer Rucker, a Texas Department of Public Safety Officer, was involved with the Sheriff. The Sheriff and Rucker were involved with Petitioner, with Petitioner's brother Raul, and with Petitioner's father in the illegal drug trade.[40] Petitioner's brother, driving Petitioner's car, killed Rucker outside of Los Fresnos in Cameron County because of disagreements that developed over the illegal drug business. Officer Carrisalez was a Los Fresnos (Cameron County) police officer and he stopped Raul who was fleeing from the Rucker homicide in Petitioner's car. Raul killed Carrisalez.

Petitioner presented these allegations to the state trial court in a habeas corpus petition filed December 12, 1990. In support of his allegations he submitted the affidavit of

Hector Villarreal, a former state court judge and practicing attorney. Former Judge Villarreal swore that his client Raul Herrera, Sr., told him that he had killed both officers, that Petitioner was not present, and that the sheriff of Hidalgo County knew both that Petitioner had not committed the crime and that Rucker was shot because of his drug dealing activities.

> In 1984 I represented Raul Herrera, one of Leonel Herrera's brothers, on a charge of attempted murder. When I began representing Raul, he was being held in the Hidalgo County Jail on this charge. I obtained Raul's release on a $25,000.00 personal recognizance bond from Judge John Dominguez.
>
> Shortly after Raul was released from the Hidalgo County Jail, we met in Edinburg to discuss preparing for trial. In the course of that meeting Raul confessed to me that he, not Leonel, had killed officers Rucker and Carrisalez.
>
> In previous conversations with Raul I had been told that Raul, Leonel, and their father, Jose Herrera, were in the drug trafficking business with the Sheriff of Hidalgo County, Brigido Marmolejo. Raul and Jose were money collectors, and Leonel was a "cutter". As a cutter, Leonel's job was to cut the pure cocaine with filler in preparation for selling it. Leonel always cut the cocaine on South Padre Island. According to Raul, David Rucker the D.P.S. officer who was killed, was also involved with the drug trafficking business: his job was to act as security for the operation. Every time Leonel went to the Island, Rucker met him and gave him coveralls to wear while he was cutting the cocaine. Part of Rucker's job was to check the coveralls to insure that Leonel did not take any cocaine.
>
> Raul told me that on September 29, 1981, Leonel was supposed to have gone to South Padre Island to cut cocaine. The plan was that he would drive there with a drug dealer from the East Coast, cut the cocaine and return, as he had done in the past. However, the night before, Leonel had gotten very "coked up". That morning his nose was bleeding badly and he was in no condition to drive to the Island. Raul went in his place. Rucker was not pleased with the switch—he did not know Raul and was used to working with Leonel. Raul and Rucker had a harsh argument about the switch and the deal did not go down because of it. When Raul and the East Coast dealer were on the way back from the Island, Rucker pulled them over on FM100. Another argument ensued and Raul shot Rucker. Shortly thereafter, Raul shot Officer Carrisalez when he was stopped for speeding.
>
> Raul told me that he drove Leonel's car to the Island. He had his own set of keys to the car because he and Leonel had keys to each other's cars. Leo always kept his identification (Social Security card) in the car.
>
> Raul did not say anything about this before Leonel was convicted because he thought he would be acquitted. However, Raul told me that when Raul was convicted and sentenced to death, Raul began blackmailing Sheriff Marmolejo. According to Raul, Sheriff Marmolejo knew that Raul killed the two officers and that D.P.S. Officer Rucker was working in the drug trade because both Raul and Rucker worked for him.

App. 10 [Docket Entry 1].[41]

Leonel Herrera contended in his state habeas corpus petition that he was innocent and his execution would violate the Eighth and Fourteenth Amendments, and that

---

[41] After Raul Herrera began to blackmail the Sheriff of Hidalgo County, Raul was shot in the back of the head and killed by Jose Lopez, who worked with the Sheriff in the drug trade and who was present with Raul when Raul killed the officers. App. 10, 16 [Docket Entry 1]. Lopez received probation for the homicide of Raul. App. 10. [Docket Entry 1].

the state had unconstitutionally failed to disclose exculpatory evidence. *See Brady v. Maryland*, 373 U.S. 83 (1963).[42] The State filed Respondent's Proposed Findings of Fact and Conclusions of Law on January 10, 1991, and, with respect to these claims, wrote at page nine that "'newly discovered evidence' . . . is not a proper basis for a writ of habeas corpus." The trial court denied all relief.[43]

---

[42] Petitioner also presented in state court 1) the affidavit of Juan Franco Palacios, *see* App. 11 [Docket Entry 1], and the affidavit of Jose Ybarra, *see* App. 15, [Docket Entry 1], in which they swore that Raul, Sr., told them separately that he, not Petitioner, killed the officers, and 2) newspaper articles, *see* App. 12 [Docket Entry 1], reporting that the sheriff had been suspected by authorities of being involved in illegal drug trafficking. The Palacios affidavit was submitted with the State Habeas Corpus Petition. The Ybarra affidavit was submitted with the Petitioner's Reply to State's Brief in Response to Petitioner's Petition for Writ of Habeaus Corpus filed January 11, 1991, in the Texas Court of Criminal Appeals.

In addition, Petitioner filed a Motion for Discovery, a Motion for Disclosure of All Evidence Favorable to the Petitioner, and an Ex Parte Motion for Compensation of Experts and Investigator, Reimbursement of Counsel's Out of Pocket Expenses, and Continuance, all directed at enabling Petitioner further to discover and demonstrate the truth of his allegations. *See* App. 17 [Docket Entry 1]. These motions were denied.

[43] The Texas Court of Criminal Appeals then stayed Petitioner's execution and received briefs and held oral argument on Petitioner's claim based upon *Penry v. Lynaugh*, 492 U.S. 302 (1989). On May 29, 1991, that court denied relief on the *Penry* issue, and adopted the trial court's proposed order on all other issues, including the *Brady*/innocence issue. (J.A. 13-14) Rehearing was denied September 18, 1991. The Texas Court of Criminal Appeals stayed issuance of its mandate until December 17, 1991, to allow a petition for writ of certiorari to be filed in this Court. A petition was timely filed on December 17, 1991. Thereupon the lower court once again set an execution date. On February 5, 1992, Petitioner sought a stay of execution in the Texas Court of Criminal Appeals. The request was denied February 11, 1992. Petitioner sought a stay of execution in this Court February 12, 1992. That request was denied February 18, 1992.

On February 13, 1992, Petitioner filed a Motion for Appointment of Counsel, For an Ex Parte Hearing in Order to be Afforded the Services of Investigators, and For a Stay of Execution, in the district court. (District Court Docket Number 92-004) [Docket Entry 1]. The motion was denied because no petition was pending. Petitioner filed a petition for writ of habeas corpus in the district court on February 16, 1992, and renewed his motion for funds.

In his petition for writ of habeas corpus, Petitioner presented additional evidence of innocence.[44] Most strikingly, he presented the affidavit of Raul Herrera's son, who swore that he witnessed the killings and that Leonel Herrera did not commit them:

> 1. I am Raul Herrera, Jr. I am the nephew of Leonel Herrera, and the son of Leonel's brother Raul Herrera. On September 29, 1981 I witnessed the murders of two police officers who were killed in the Rio Grand Valley. At that time I was nine years old. The first one, whose name I later found out was David Rucker, was shot near Port Isabel, Texas, and the second one, whose name I later found out was Enrique Carrasalez, was shot while we were on our way home to Edinburg. He was shot near Los Fresnos. My father, Raul Herrera, shot both of the men. A man named Chavello Lopez was also in the car when my father shot the men. At that time, my father and Chavello were best friends and business partners. They were together almost all the time. My Uncle Leonel was not present with us when my father killed the officer. Only myself, Chavello and my

---

[44] The evidence was also included in Petitioner's Motion for Ex Parte Hearing in which Petitioner explained the difficulty of investigating law enforcement misconduct in the Valley and sought the assistance of an investigator pursuant to the Anti-drug Abuse Act of 1988. (District Court Docket Number 92-004) [Docket Entry 1].

father were in the car when the shootings happened. . . .

3. I knew at that time that my grandfather and father and my Uncle Leonel were in a drug business together with some other people in the valley and I knew that they worked dealing drugs for the sheriff of Hidalgo County . . . .

Then we drove to near Port Isabel where my father killed the first officer. My father actually did the driving. Chavello sat in the front seat next to my father, and I rode in the back seat of the car. The officer that was killed met us at a rest stop off the highway. My father pulled the car over first. He told me to stay down in the car. Then he got out of the car and spoke to the officer and then he shot him. My father got back in the car and we drove away.

6. We were driving back toward Edinburg when we were pulled over by another police officer. My father pulled over the car and opened the driver's side door. He stepped half way out of the car and shot several times. At that time I hid on the floor between the front and back seats of the car . . . .

8. I told a police officer about my father having been the one that shot the police officers and not my Uncle Leonel, but he told me never to say anything about it again.

App. 16. [Docket Entry 1]. The district court judge denied relief on five of Petitioner's claims, finding them to constitute an abuse of the writ. (J.A. at 40-53). But as to the claim of innocence the district court judge entered a stay of execution. (J.A. at 52-53). The district court judge also determined that an evidentiary hearing and a stay of execution was necessary with respect to the *Brady* claim, and he supplemented his stay order and scheduled an evidentiary hearing for three days later. (J.A. at 54-55).

The state sought to vacate the stay, arguing that innocence was irrelevant. *See* Respondent-Appellant's Motion to Vacate Stay of Execution and Expedite Appeal at 8 ("[A] claim of newly discovered evidence . . . [is] clearly not cognizable . . . ."). The Court of Appeals agreed, and vacated the stay of execution. (J.A. at 68-69). This Court granted certiorari on February 19, 1992, and the Texas Court of Criminal Appeals stayed Petitioner's execution.

SUMMARY OF ARGUMENT

The Court of Appeals did not quarrel with Leonel Herrera's evidence that he did not commit the murder for which he was convicted and sentenced to death. The panel held that "Herrera's assertion of 'actual innocence' presents no . . . claim for relief." (J.A. at 67.) Petitioner contends that the promises made by the Eighth and Fourteenth Amendments should not be so empty. Nothing is more barbaric, is more shocking to the conscience, or is more at odds with contemporary standards of fairness—the touchstones of the Eighth and Fourteenth Amendments—than gratuitously to execute an innocent person. This Court should not countenance such an affront to human dignity.

Texas provides Petitioner with no forum to present his claim. The door to prevent a wrongful execution is permanently sealed to an inmate thirty days after trial in Texas. Because the State of Texas has chosen not to provide a death sentenced inmate with any corrective process whatsoever, the district court properly should have entertained Petitioner's claim of actual innocence pursuant to its federal habeas corpus jurisdiction. This result is compelled not only by the Eighth and Fourteenth Amendments, but also by this Court's emerging consensus that the primary purpose of federal habeas corpus is to provide a "safety valve" for the extraordinary case of the innocent defendant, i.e., to prevent fundamental miscarriages of justice.

ARGUMENT

I. THE EXECUTION OF AN INNOCENT PERSON VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS

A. Society Recoils At the Execution of Innocent Persons

The Eighth Amendment "expresses the revulsion of civilized man against barbarous acts—the 'cry of horror' against man's inhumanity to his fellow man." *Robinson v. California*, 370 U.S. 660, 676 (1962) (Douglas, J., concurring). It protects "nothing less than the dignity of man." *Trop v. Dulles*, 356 U.S. 86, 100 (1958); *accord Gregg v. Georgia*, 428 U.S. 153, 182-83 (1976) (plurality opinion of Stewart, Powell, & Stevens, JJ.) ("[T]he basic concept of human dignity [is] at the core of the Amendment.").[45]

The Fourteenth Amendment also protects citizens against unconscionable state action. It declares: No person shall be deprived of "life, liberty or property without due process of law." Though the majestic phrase "due process" eludes precise definition, it is always violated when a particular state action "shocks the conscience,"

[45] *See also Stone v. Powell*, 428 U.S. 465, 491 n.31 (1976) (Habeas corpus "recogniz[es] the need in a free society for an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty."); *id.* ("[H]abeas corpus . . . [is] a remedy for 'whatever society deems to be intolerable restraints. . . .'") (citation omitted). "Punishment may be 'cruel and unusual' because of its barbarity or because it is 'excessive' or 'disproportionate' to the offense," *Spaziano v. Florida*, 468 U.S. 447, 477 (1984) (Stevens, J., concurring in part and dissenting in part) (footnote omitted), if it is "abhorrent to currently existing moral values," *Furman v. Georgia*, 408 U.S. 238, 333 (1972) (Marshall, J., concurring), "if citizens found it to be morally unacceptable" *id.* at 332, if it is "inhuman and barbarous," *In re Kemmler*, 136 U.S. 436, 447 (1890), or if it "shocks the conscience and sense of justice of the people." *United States v. Rosenberg*, 195 F.2d 583, 608 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952) (internal quotations omitted).

Rochin v. California, 342 U.S. 165, 172 (1952) (Frankfurter, J.), when it violates "civilized standards," *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 468 (1947) (Frankfurter, J., concurring), or when "a principle of justice 'rooted in the traditions and conscience of our people'" is offended. *Id.*, 329 U.S. at 470 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

Mr. Herrera's case presents this Court with the most profound issue confronting a civilized society: Does the Constitution countenance the state's power to execute an innocent citizen? Or, more fundamentally: Does the moral authority of any state extend so far? Every citizen would instinctively reply "No" if asked whether the State could, consistent with the Constitution, execute a person who the State suspects is innocent. Preserving the life of an innocent person wrongly convicted is the irreducible promise the state makes to the individual when he or she consents to enter organized society. It is a promise that comforts every rational person in this and all other countries. Any nation of laws without a commitment to this immutable principle sacrifices its moral authority. It breaches the social contract.

Hence society recoils at State execution of an innocent person. Such a barbaric act is "at odds with contemporary standards of fairness and decency," *Spaziano*, 468 U.S. at 465, and would be "bound to offend even hardened sensibilities." *Rochin*, 342 U.S. at 172; *see also Pulley v. Harris*, 465 U.S. 37, 68 (1984) ("The execution of someone who is completely innocent . . . [is] the ultimate horror case.") (Brennan, J., dissenting) (quoting John Kaplan, *The Problem of Capital Punishment*, 1983 U. Ill. L. Rev. 555, 576) (internal quotations omitted).[46] "The infliction

[46] Sir John Fortescue relayed the story of a judge who allowed a person to be executed. It subsequently came to light that the person was innocent. Fortescue remarked of the judge: "[N]ever in his life would he purge his mind of that deed of his." John Fortescue, *De Laudibus Legum Anglie* 135 (1490). The Attorney Gen-

of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering." *Furman*, 408 U.S. at 279 (Brennan, J., concurring).

B. This Court's Jurisprudence Reflects Society's Collective Conscience And Requires Procedures Which Will As Much As Is Humanly Possible Prevent the Execution of An Innocent Person

The "natural abhorrence civilized societies feel at killing," *Ford v. Wainwright*, 477 U.S. 399, 409 (1986), an innocent person requires that the law remove that possibility as much as is humanly possible. This abhorrence finds expression in this Court's Eighth Amendment, Fourteenth Amendment, and habeas corpus jurisprudence. First, as a matter of substantive Fourteenth Amendment law, "no person may be punished criminally save upon proof of some specific criminal conduct," *Schad v. Arizona*, —— U.S. ——, 111 S. Ct. 2491, 2497 (1991), beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307 (1979). A vast array of due process protections helps to assure that no innocent person is convicted of a crime.[47]

---

eral for Texas from 1983 to 1991 feared this "abhorrent" possibility: "My worst nightmare would have been the execution of an innocent person." Jim Mattox, "On Not Executing an Innocent Prisoner," *N.Y. Times*, Apr. 3, 1992, at A28.

Charles Dickens opposed the death penalty due to the "possibility of mistake," *Selected Letters of Charles Dickens* 215 (David Paroissien ed., 1985), as did Jeremy Bentham. *See* Jeremy Bentham, 1 *Works of Jeremy Bentham* 447 (John Bowring ed., 1843). While the reasons that the rest of the western world abolished capital punishment vary somewhat among nations, one common thread is the fear of executing an innocent person and public reaction to the execution of innocent persons. *See, e.g.*, Elizabeth Tuttle, *The Crusade Against Capital Punishment in Great Britain*, 106-20 (1961); Edna Nixon, *Voltaire and the Calas Case* (1961); Ludovic Kennedy, *Ten Killington Place* (1961).

[47] *See, e.g., Coy v. Iowa*, 487 U.S. 1012 (1988) (defendant has the right to confront witnesses against him); *Taylor v. Illinois*, 484 U.S. 400 (1988) (defendant has right to present witnesses in his own defense); *Strickland v. Washington*, 466 U.S. 668 (1984) (defendant has right to the effective assistance of counsel); *In re Winship*, 397 U.S. 358 (1970) (state must prove defendant's guilt beyond a reasonable doubt); *United States v. Wade*, 388 U.S. 218 (1967) (defendant has right to counsel at post-indictment lineup); *Brady v. Maryland*, 373 U.S. 83 (1963) (state has affirmative duty to disclose exculpatory evidence); *In re Murchison*, 349 U.S. 133 (1955) (defendant is entitled to a fair trial before impartial tribunal).

Despite these protections, it is common (and tragic) knowledge that mistakes are made in criminal trials. "[O]ur system of criminal justice does not work with the efficiency of a machine—errors are made and innocent as well as guilty people are sometimes punished. . . . [T]he sad truth is that a cog in the machine often slips: memories fail; mistaken identifications are made; those who wield the power of life and death itself—the police officer, the witness, the prosecutor, the juror, and even the judge—become overzealous in their concern that criminals be brought to justice." Foreword, Jerome Frank & Barbara Frank, *Not Guilty* 11-12 (1957).

Regardless, "arriving at the truth is a fundamental goal of our legal system." *United States v. Havens*, 446 U.S. 620, 626 (1980) (citing *Oregon v. Hass*, 420 U.S. 714, 723 (1975)). "'[T]he twofold aim [of criminal law] is that guilt shall not escape or innocence suffer.'" *United States v. Nixon*, 418 U.S. 683, 709 (1974) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1934)). Whenever the state discovers a mistake has been made the laws must allow corrective action.

[48] "The death penalty is said to serve two principle social purposes: retribution and deterrence of capital crimes by prospective

Second, as a matter of substantive Eighth Amendment law, "a person who has not in fact killed, attempted to kill, or intended that a killing take place or that lethal force be used may not be sentenced to death," *Cabana v. Bullock*, 474 U.S. 376, 386 (1986), and if such a sentence is imposed the "Eighth Amendment violation can be adequately remedied by any court that has the power to find the facts and vacate the sentence," *id.* at 386, and "prevent the execution . . ." *Id.* at 390; *cf. Tison v. Arizona*, 481 U.S. 137, 158 (1987) (absent "major participation in the felony committed, combined with reckless indifference to human life," death penalty prohibited).[48]

Third, innocence gives special life to claims that might otherwise be forfeited in federal habeas corpus proceedings. Federal habeas corpus is, at bottom, "governed by equitable principles." *Fay v. Noia*, 372 U.S. 391, 438 (1963) (citation omitted). The most basic equitable principle is that courts must prevent a fundamental miscarriage of justice. *Cf. McCleskey v. Zant*, —— U.S. ——, 111 S. Ct. 1454, 1471 (1991). The execution of an innocent person is the paradigm of a fundamental miscarriage of justice. It is fair to say that this Court's federal habeas corpus jurisprudence over the last fifteen years has become increasingly concerned with protecting innocent persons. In *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion), for example, Justice O'Connor observed that "our cases have moved in the direction of reaffirming the relevance of the likely accuracy of convictions in determining the available scope of habeas relief." *Id.* at 313 (citations omitted). Similarly, in *Harris v. Reed*, 489 U.S. 255 (1989), three members of this Court acknowledged that in habeas corpus there must be a "kind of 'safety valve' for the 'extraordinary case' " of the factually innocent defendant. *Id.* at 271 (O'Connor, J., concurring); *see also McCleskey*, 111 S. Ct. at 1471 (The ends of justice "require[] federal courts to entertain successive petitions when a petitioner supplements a constitutional claim with a 'colorable showing of actual innocence.' The miscarriage of justice exception serves as 'an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty.' ") (citation omitted); *Stone v. Powell*, 428 U.S. 465, 491 n.31

offenders." *Gregg*, 428 U.S. at 183 (opinion of Stewart, Powell, & Stevens, JJ.) (footnote omitted). Executing innocent persons would not deter crime, and because retribution has as its benchmark "that punishment should be directly related to the personal culpability of the criminal defendant," *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring), obviously there is no retribution in executing an innocent person. Such an execution could serve no other function than the gratuitous infliction of suffering.

(1976) (recognizing that habeas corpus ensures that no "innocent man suffer an unconstitutional loss of liberty"); *Schneckloth v. Bustamonte*, 412 U.S. 218, 257-58 (1973) Powell, J., concurring) ("[T]he central reason for habeas corpus [lies in] the affording of means of . . . redressing an unjust incarceration.")[40]

These and other cases describe the central purpose of federal habeas corpus as remedying the nearly ultimate injustice: incarceration of an actually innocent defendant. *See, e.g., Murray v. Carrier*, 477 U.S. 478, 495 (1986) ("[W]here a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas corpus court may grant the writ even in the absence of a showing of cause for the procedural default."). *A fortiorari*, habeas corpus lies to prevent the ultimate punishment—taking the life—of an innocent person.

In sum, this Court's Eighth and Fourteenth Amendment expressions delimit the bedrock principle that an innocent person should not suffer society's ultimate punishment. Because executing an innocent person would be repugnant to any civilized person and would serve no societal purpose, to do so would entail "the gratuitous infliction of suffering," *Gregg*, 428 U.S. at 183 (opinion

[40] A corollary of these decisions is that the need for finality of criminal judgments must yield when the case involves an innocent defendant. *See, e.g., McCleskey*, 111 S. Ct. at 1471 (holding second habeas corpus petition must be addressed on merits where petitioner makes "colorable showing of actual innocence"); *Schneckloth*, 412 U.S. at 257 (" '[W]here *personal* liberty is involved, a democratic society . . . insists that it is less important to reach an unshakable decision than to *do justice*. . . .' ") (footnote omitted) (emphasis added by Powell, J., concurring); *see also* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 150 (1970) ("The policy against . . . executing an innocent man . . . should far outweigh the desired termination of litigation.") (footnote omitted) (internal quotations omitted).

of Steward, Powell, & Stevens, JJ.), and would violate the Eighth and Fourteenth Amendments.

II. BECAUSE THE STATE OF TEXAS DOES NOT PROVIDE A DEATH-SENTENCED INMATE A MEANINGFUL POST-TRIAL OPPORTUNITY TO DEMONSTRATE HIS OR HER INNOCENCE, FEDERAL HABEAS CORPUS RELIEF MUST BE AVAILABLE

As the Court of Appeals noted, the state of Texas provides no post-trial procedure for raising a claim of innocence. (J.A. at 67.) A claim based upon newly discovered evidence of innocence must be raised within thirty days of trial in Texas, or it is forever barred.[50] Thus innocence, even if proved beyond all doubt, is simply not remediable by any Texas court.

Where, as here, state corrective procedures are absent with respect to federal constitutional claims as fundamental as Mr. Herrera's claim of innocence, federal courts must act. *See Jennings v. Illinois*, 342 U.S. 104, 111

---

[50] Texas courts have construed the time limits strictly. Motions for new trial must be filed and amended "within the said 30 days and not thereafter." *Dugard v. State*, 688 S.W.2d 524, 530 (Tex. Crim. App. 1985), *overruled on other grounds by Williams v. State*, 780 S.W.2d 802 (Tex. Crim. App. 1989). In fact the thirty day limit is jurisdictional: "a trial judge ha[s] no jurisdiction to entertain an out of time motion for new trial." *Beathard v. State*, 767 S.W.2d 423, 433 (Tex. Crim. App. 1989); *see also Drew v. State*, 743 S.W.2d 207, 223 (Tex. Crim. App. 1987); *Ex parte Drewery*, 677 S.W.2d 533, 536 (Tex. Crim. App. 1984).

Texas habeas corpus law also prohibits Mr. Herrera from raising his innocence claim. The Texas post conviction statute substantively bars applicants from raising claims of newly discovered evidence. *Ex parte Binder*, 660 S.W.2d 103, 106 (Tex. Crim. App. 1983). This bar even applies to newly discovered evidence claims relating to the guilt of the defendant. *See Ex parte May*, 717 S.W.2d 84, 88 (Tex. Crim. App. 1986) ("The existence of newly discovered evidence relevant to the guilt of the applicant is not a ground for relief in a post-conviction writ of habeas corpus."); *accord Banspach v. State*, 91 S.W.2d 365 (Tex. Crim. App. 1936).

(1951) ("[W]here the state does not afford a remedy, a state prisoner may apply for a writ of habeas corpus in the United States District Court . . . ."). [51] In other words, as Professor Bator noted, pursuant to even the most restrictive view of federal habeas corpus, "if the totality of the state procedures allegedly did not provide rational conditions for inquiry into federal-law (or indeed, state-law) questions, . . . federal habeas jurisdiction may appropriately examine the allegation . . . ." *See* Paul Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 457 (1963) (footnote omitted). [52]

---

[51] *See also Hawk v. Olson*, 326 U.S. 271, 276 (1945) ("When the state does not provide corrective judicial process, the federal courts will entertain habeas corpus to redress the violation of the federal constitutional right.") (citation omitted); *Ex parte Hawk*, 321 U.S. 114, 118 (1944) ("[W]here resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised . . . because the state affords no remedy . . . a federal court should entertain his petition for habeas corpus, else he would be remediless.") (citations omitted); *Mooney v. Holohan*, 294 U.S. 103, 112-13 (1935) (federal habeas corpus jurisdiction obtains when state has failed to provide corrective process).

[52] The Court of Appeals, in reliance upon *Townsend v. Sain*, 372 U.S. 293, 317 (1963), held that federal habeas corpus could provide no remedy for Petitioner's predicament. *Townsend* contains language which suggests that if newly discovered evidence is "merely . . . relevant to the guilt of a state prisoner," and not to the "constitutionality of the [prisoner's] detention," habeas relief is unavailable. *Id.* But Petitioner's challenge is to his unjust execution, not his conviction, and "[i]n capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases." *Ake v. Oklahoma*, 470 U.S. 68, 87 (1985) (Burger, C.J., concurring in the judgment); *see also California v. Ramos*, 463 U.S. 992, 1009 (1983) (discussing the "concern . . . regarding the risk of an unwarranted conviction"). As put by the Court, "death is different." *See, e.g., Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (Death is "most irremediable and unfathomable of penalties."); *Ramos*, 463 U.S. 998-99 ("[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing deter-

Federal habeas corpus review of claims not cognizable in state collateral proceedings is critical in capital cases due to the unique and irrevocable nature of the penalty of death. "Death is different" and this difference requires a correspondingly higher degree of reliability in the fact-finding process. *Ford*, 477 U.S. at 411; *see also Caldwell v. Mississippi*, 472 U.S. 320, 343 (1985) (State procedures cannot create "an unacceptable risk that 'the death penalty [may have been] meted out arbitrarily or capriciously' or through whim . . . or mistake."). Furthermore, the state's obligation to provide meaningful and

---

mination."); *Gardner v. Florida*, 430 U.S. 349, 357 (1977) ("[D]eath is a different kind of punishment from any other which may be imposed in this country.").

Thus, a remedy that may be unavailable to an imprisoned person may be available for a death-sentenced inmate. Consequently, Respondent's and the lower court's reliance upon *Townsend* in support of the argument that newly discovered evidence challenges to *convictions* are not cognizable in federal habeas corpus begs the question.

Townsend is not controlling for many other reasons. First, of course, the language in *Townsend* regarding newly discovered evidence is dicta. Second, while *Townsend* was a capital case, it was decided before this Court's numerous decisions establishing a heightened degree of reliability on fact-finding procedures in capital cases. *See, e.g., Ford*, 477 U.S. at 411. Third, the petitioner in *Townsend* did not assert his innocence, or allege that it was unconstitutional to execute an innocent person. Petitioner is asserting that it violates the Eighth and Fourteenth Amendments to execute him because he is innocent. Thus, the newly discovered evidence of innocence in Mr. Herrera's case is relevant to the constitutionality of his detention. Fourth, the state of Townsend's conviction, Illinois, provided him with an opportunity to present an assertion of innocence. *See People v. Dabbs*, 23 N.E.2d 343 (Ill. 1939). As noted previously, Texas does not.

Several courts of appeal have rejected the part of *Townsend* relied upon by the lower court. *See, e.g. Sanders v. Sullivan*, 863 F.2d 218, 225 (2d Cir. 1988); *Lewis v. Erickson*, 946 F.2d 1361 (8th Cir. 1991). Furthermore, it is significant to note that even Judge Friendly thought this aspect of *Townsend* was incorrect. *See* Friendly, *supra*, 38 U. Chi. L. Rev. at 159, n.87.

reliable procedures does not end at trial. Some issues raised post-trial require relief. Rational and reliable post-trial mechanisms must be provided to defendants raising such claims.[53] *Johnson v. Mississippi*, 486 U.S. 578 (1988); *Ford*, 477 U.S. at 411 ("If the Constitution renders the fact or timing of his execution contingent upon establishment of a further fact, then that fact must be determined with the high regard of truth that befits a decision affecting the life or death of a human being."). Evidence of innocence, like incompetency to be executed, should be considered when presented.[54]

Thus under these circumstances the only rule consistent with the core Eighth Amendment principle that an innocent person may not be executed is that claims of inno-

---

[53] The state may argue that an assertion of innocence can be remedied through executive clemency. Clemency is not a substitute because the "very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943). Furthermore, as this Court stated in *Ford*, clemency is not adequate because it is the Governor's subordinates that are trying to carry the execution out. Thus, in a capital case, the "vindication of a constitutional right [may not] be entrusted to the unreviewable discretion of an [executive-] administrative tribunal." *Ford*, 477 U.S. at 416.

[54] In this regard, it is important to keep in mind that petitioner is asserting two different violations of his right to due process of law (as well as a violation of the Eighth Amendment). The first is his substantive due process right not to be executed because he is in fact innocent of the offense. *See supra* at pages 32-38. The second, set forth here, is a procedural due process right. The Due Process Clause places upon the states the obligation to afford a defendant a full system of meaningful remedies. If not afforded, then a federal court has the obligation to intervene. *See generally Harris, supra*, 489 U.S. at 268. (O'Connor, J., concurring) ("[I]n determining whether a remedy for a particular constitutional claim is 'available,' the federal courts are authorized, indeed required, to assess the likelihood that a state court will accord the habeas petitioner a hearing on the merits of his claim").

cence are cognizable in federal habeas corpus proceedings. This is an especially necessary rule given the widely accepted view that federal habeas corpus acts as a "safety valve" for innocent defendants, *see Harris*, 489 U.S. at 271 (O'Connor, J., concurring), and the acknowledged fact that Petitioner has no state court remedy. This rule would dispose of the dispute before this Court, and would allow the lower court an important initial opportunity to hear the evidence and resolve the merits of Petitioner's claim.

The constitutional claim Mr. Herrera presented to the district court is as sensitive as it is fundamental—a claim of innocence, a claim that the crime was committed by someone else, and a claim that the local law enforcement officials engaged in illegal activity and coverup both before, during and after the trial of this case. While the issue of whether the constitution prohibits executing innocent persons is straightforward, as is the corresponding requirement that federal courts carefully review the issue in the absence of a state corrective process, the application of this rule to specific cases is singularly a function of facts. While determining facts is similarly straightforward, it is traditionally a matter for a trial level court, and under these circumstances this case should be remanded.[55]

As a general rule, the prudent course in developing constitutional doctrine, especially on issues as fundamental as the one presented here, is first fully to air all

[55] The district court was poised to address the issues, having stayed the execution on the basis of the claim presented here and having promptly scheduled an evidentiary hearing on Petitioner's *Brady* claim. The district judge's familiarity with the criminal justice system as it is administered in South Texas and his knowledge of the culture of the communities in that area undoubtedly will and should inform the exercise of discretion in addressing Mr. Herrera's claim. *See Granberry v. Greer*, 481 U.S. 129, 136 (1987) (recognizing that many issues in habeas corpus cases should be resolved in first instance by lower federal courts due to their greater "familiarity with state criminal practice").

aspects of the issue. *See United States v. C.I.O.*, 335 U.S. 106, 126 (1948) (Frankfurter, J., concurring) (counseling against formulating principles of "constitutional law broader than is required by the precise facts of the situation . . . .") (citations omitted); *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977) (extolling "wisdom of allowing difficult issues to mature through full consideration" in lower court proceedings). In these circumstances, the course long followed by this Court is to announce the constitutional rule and then allow the lower courts to apply it in light of the allegations made. *See Keeney v. Tamayo-Reyes*, 1992 U.S. Lexis 2690, *17 (May 4, 1992) (adopting cause-and-prejudice standard for determination of whether federal habeas corpus petitioner entitled to evidentiary hearing and remanding case to district court for application of newly-adopted standard); *C.I.O.*, 335 U.S. at 126 (observing that it is inadvisable to make broader pronouncements than necessary where issues "come here not so shaped by the record and by the proceedings below as to bring [the claims] before this Court as leanly and as sharply as judicial judgment . . . requires") (Frankfurter, J., concurring); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring); *City of Hammond v. Schappi Bus Line, Inc.*, 275 U.S. 164, 169-72 (1927).[56]

If the Court wishes to delineate some rough initial parameters for application below, several considerations are important. First, what must one do to establish a claim for relief? Second, once the claim is properly pled, what procedures must be afforded to decide the issue?

[56] This is precisely the approach followed in *Ford*. Once the underlying constitutional question regarding the execution of the insane was settled, the combined opinions left for the lower courts to delineate "the precise limits that due process imposes in this area." *Ford*, 477 U.S. at 427 (Powell, J., concurring).

As to the first consideration, perhaps the best articulation of a restrictive but workable standard is found in Judge Friendly's seminal article. According to Judge Friendly, in order to prevail on a claim of innocence an inmate would have to show a fair probability that in light of all the evidence—including the evidence that is newly discovered—the trier of fact would have entertained a reasonable doubt of his guilt. *See* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 160 (1970).[57]

As for procedures, what is required by due process will likely as an initial matter depend upon the corrective procedures provided by the state courts. If a state provides a death sentenced inmate with a meaningful, full and fair opportunity to present the claim, then perhaps a federal court's role is more limited. At a minimum, a fundamental requisite of due process is "that an individual is entitled to an 'opportunity to be heard.'" *Ford*, 477 U.S. at 430 (O'Connor, J., concurring) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). The core requirements of an opportunity to be heard include: an impartial fact-finder; the right to present relevant evidence; and, the right to challenge the evidence offered by the opposing party. Petitioner has never been afforded these basic safeguards in connection with his compelling claim of innocence, and they should be provided in the district court.

---

[57] This is similar to the standard utilized by several federal courts of appeal. The Second Circuit uses a "would likely affect the verdict" standard. *Sanders v. Sullivan*, 863 F.2d 218, 225 (2d Cir. 1988). The Third Circuit uses a "would probably produce an acquittal on retrial standard." *De Martino v. Weidenburner*, 616 F.2d 708, 711 (3d Cir. 1980), as does the Eighth Circuit, *Lewis v. Erickson*, 946 F.2d 1361, 1362 (8th Cir. 1991), and the Ninth Circuit. *Quigg v. Crist*, 616 F.2d 1107, 1112-13 (9th Cir.), *cert. denied*, 449 U.S. 922 (1980).

CONCLUSION

For all these reasons, the judgment of the United States Court of Appeals should be reversed and this case should be remanded to the district court.

Respectfully submitted,

TALBOT D'ALEMBERTE
STEELE, HECTOR & DAVIS
First Florida Bank Building
Tallahassee, FL 33102
(904) 222-2300

MARK EVAN OLIVE *
2804 Glennis Ct.
Tallahassee, FL 32304
(904) 644-7710

ROBERT L. MCGLASSON
PHYLLIS L. CROCKER
TEXAS RESOURCE CENTER
1206 San Antonio
Austin, TX 78701
(512) 320-8300

Counsel for Petitioner

* Counsel of Record